Supreme Court, U.S.
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No. 02-872

In The

Supreme Court of the United States

MARIS DISTRIBUTING COMPANY,

Petitioner,

v.

ANHEUSER-BUSCH, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. MARIS is not Attempting to Argue an Unpled Tying Claim

BUSCH's Brief claims that MARIS is attempting to present a "newly minted tying claim" to this Court which has never been pled or litigated. MARIS has never argued that this case was pled as an illegal tying case. MARIS's Certiorari Petition references antitrust tying principles only in a single paragraph to illustrate a mechanism recognized by this Court through which a party may transfer its market power from one market to another. [Cert.Pet. at p. 25]. This was in response to the Eleventh Circuit's conclusion "that MARIS has not identified a valid economic reason why Anheuser-Busch's alleged market power in the beer market should create market power in the different market for the purchase and sale of equity interests in beer distributorships." [App. at p. 18].

MARIS does not argue that BUSCH's tying of the sale of its product to an agreement by distributors to give BUSCH control over the sale of beer distributorships is a per se illegal tying arrangement. MARIS merely argued that the tying arrangement is the mechanism through which BUSCH parlayed its market power in the beer market into market power in the relevant market and submarkets for beer distributorships. BUSCH's transfer of that market power from one market to another does not trigger an antitrust violation. The violation is triggered only because the public ownership prohibition at issue has

potential anticompetitive effects in the relevant market and submarket.[1]

II. BUSCH Distinguishes *Kodak* on Irrelevant Grounds

BUSCH argues that *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992) is "factually and legally inapposite" because *Kodak* involved an illegal tying claim. An initial and necessary aspect of *Kodak* was a determination of whether Kodak had market power in the tying market for replacement parts. This Court concluded that Kodak may have obtained market power in the replacement parts market through contractual prohibitions and "pressure" and that these contracts and pressure *"would be sufficient to entitle respondents to a trial on their claim of market power." Id.* at 465. It was only after this court concluded that Kodak might have market power in the tying market by virtue of its contracts and "pressure" that *Kodak* addressed the existence of an illegal tying of replacement parts to a different market. The Eleventh Circuit failed to follow *Kodak* by refusing to recognize that BUSCH could acquire market power in the market for beer distributorships through contracts and pressure through which it controlled distributorship sales.[2]

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[1] BUSCH's argument that MARIS never challenged BUSCH's "right of approval" of distributorship sales "as an antitrust violation" is misplaced. BUSCH's control over distributorship sales merely creates market power, not an antitrust violation.

[2] BUSCH's distinction of *Virtual Maintenance, Inc. v. Prime Computer, Inc.*, 11 F.3d. 660 (6th Cir. 1993), on the same ground is similarly irrelevant. In *Virtual Maintenance*, the court identified "an

(Continued on following page)

III. BUSCH Distinguishes *Spectators* on Irrelevant Points

BUSCH distinguishes *Spectators Communication Network, Inc. v. Colonial Country Club*, 253 F.3d. 215 (5th Cir. 2001), by maintaining that *Spectators* is "inapposite because it involved an alleged group boycott – *viz.* a collective horizontal restraint. . . . " [BUSCH Brief at p. 14]. In *Spectators*, the Fifth Circuit held that it was improper to dismiss an antitrust claim against one party to an anticompetitive agreement (or conspiracy) on the grounds that the party did not have market power where the combination of parties to the agreement had market power. BUSCH can draw no meaningful distinction between factors to consider in evaluating market power in this case as opposed to *Spectators*.

As in *Spectators*, BUSCH has secured an agreement from 700 other parties controlling a majority of the relevant market and the entire submarket to boycott public companies. As in *Spectators*, the nature of the market power to be examined in determining the anticompetitive nature of this boycott is the market power of all parties thereto. There is no distinction between a conspiracy to boycott and an agreement to boycott. BUSCH's equity agreement is a "hub and spoke" conspiracy to boycott

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exclusive distribution license" as the basis of the defendant's market power in the market for certain software support. *Virtual Maintenance*'s finding of market power from an "exclusive distribution license" cannot be reconciled with the Eleventh Circuit's rejection of market power arising from the exclusive distribution agreements between BUSCH and its distributors.

public companies from the relevant market and submarket.

Following *Spectators*, the relevant inquiry is the combined market power of all parties that have agreed to boycott public companies. If all beer distributors, absent BUSCH's participation, had agreed to bar public companies from participating in the relevant market, *Spectators* clearly would have required considering the combined market power of all participating distributors. If BUSCH then joined the agreement, its entry into the boycott would not create antitrust immunity or require a different analysis. A "hub and spoke" conspiracy with BUSCH at the hub orchestrating the boycott of public companies does not alter the economic impact of the parties' agreement or the reasoning in *Spectators*.

IV. BUSCH Misapprehends MARIS's References to Excluded Evidence

BUSCH correctly notes MARIS's statements in its Certiorari Petition that the trial court excluded evidence of BUSCH's detailed written plans for pressuring distributors to exit the market as well as evidence of BUSCH's market-wide activities in forcing market exits by wrongfully threatening distributors with termination and wrongfully terminating distributors. BUSCH then characterizes these matters as an improper attempt to challenge those evidentiary rulings. That argument confuses the issue.

The core issue raised in MARIS's Certiorari Petition arose from the trial court's entry of a directed verdict in favor of BUSCH on the issue of whether BUSCH had market power. The trial court and Eleventh Circuit ruled that a showing of market power had not been made, in

part, because MARIS relied on the powers that flowed to BUSCH from its 700 distributorship contracts to establish market power. The trial court also excluded evidence of BUSCH's termination threats, pressure, and termination of distributors on the ground that those matters related to contract power and not market power. That ruling was premised upon the same principle which led to the directed verdict – that contract power could not be used to establish market power. If the Eleventh Circuit's ruling that power related to 700 contracts which give a party control over an entire relevant submarket may not be used to establish market power is rejected, then both the directed verdict and exclusion of this evidence are improper. BUSCH's hypertechnical attempts to distinguish ramifications flowing from the same legal principle have no currency.

V. The Eleventh Circuit Created a Contract Power Exception to a Finding of Market Power Under the Sherman Act

BUSCH cites the Eleventh Circuit's disclaimer that "anticompetitive actions are not immunized by virtue of being memorialized in a contract" as a refutation of MARIS' argument that the Eleventh Circuit created a "contract power exception" to a finding of market power. [Brief at p. 15]. The Eleventh Circuit's statement was a reference to the obvious fact that Section I of the Sherman Act requires an "agreement" and that, therefore, the existence of an anticompetitive contract cannot possibly immunize a party from antitrust liability. That pronouncement means only that the Eleventh Circuit did not consider inclusion of the public ownership prohibition in BUSCH's distributorship agreements as a bar to BUSCH's

antitrust liability. There is no question, however, that the Eleventh Circuit held that power over a relevant market which arises in connection with a series of contracts cannot give rise to market power. MARIS fairly characterized that ruling as a "contract power exception."

VI. MARIS's Certiorari Petition Accurately States the Record

BUSCH argues the MARIS "takes enormous liberties with the record" and cites as an example MARIS's statement that BUSCH directed distributors regarding prices to charge retailers. BUSCH claims that "this issue was never part of the case at trial or the appellate level, and there certainly is no evidence in the record (or otherwise) that Anheuser-Busch directed its wholesalers to charge certain prices to retailers." [BUSCH Brief at p. 4]. BUSCH has overlooked significant portions of the record. For instance, Rudolph Maris testified that when BUSCH requested price increases, he "had to go along with the price increase otherwise I would be hounded or there would be repercussions." [Trial TR Sept. 27, 2000 at p. 105]. MARIS specifically stated its position at trial that BUSCH's ability to pressure small family owned distributors on pricing matters "relates to the anticompetitive effect, which is the ability of Anheuser-Busch to control prices by keeping the distributor under their influence." [Trial TR Sept. 27, 2000 at p. 108]. One of MARIS' economists specifically identified Rudolph MARIS' above cited testimony as evidence of harm to competition. [Trial TR

Oct. 19, 2000 at p. 152-154]. MARIS took no liberties with the record.[3]

Respectfully submitted,

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[3] BUSCH claims that MARIS inaccurately attempted to "create the impression that it bought the distributorship from Anheuser-Busch." BUSCH also alleges that MARIS's Petition inaccurately represents that there was a deal between Roger Maris and August Busch, Jr. connecting the MARIS family's acquisition of the distributorship to Roger Maris playing "an extra year of baseball." These claims are misguided. Rudolph Maris testified regarding a meeting with August Busch, Jr. he attended with his brother, Roger, in the 1967 baseball season wherein the Marises were offered their distributorship and Roger Maris was requested (and agreed) to "play one more year." [Trial TR Sept. 26, 2000 at p. 131]. The Marises then paid the Gainesville and Ocala distributor (who was awarded the Tampa territory) for his tangible assets and paid BUSCH for the inventory. [Trial TR Sept. 26, 2000 at p. 136-139]. It was only after MARIS acquired the distributorship that BUSCH implemented an Equity Agreement to encourage its distributors to invest in their markets by allowing them to build, sell, and bequeath equity. MARIS built its territory throughout the next 28 years from a rural outpost to one of the largest BUSCH distributors.